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MARIS

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

*[Protest of Proposed Award of Army Contract]*

FILE: B-199550.2; B-199550.3; DATE: January 29, 1981  
B-199550.4  
MATTER OF:

Sentinel Electronics, Inc.; E-Systems, Inc.;  
Cincinnati Electronics Corp.

**DIGEST:**

1. Protest of award to low bidder is moot where Small Business Administration declines to issue Certificate of Competency after agency finds bidder nonresponsive.
2. GAO will not question issuance of Certificate of Competency unless fraud is shown or SBA fails to consider vital information bearing on small business bidder's compliance with definitive responsibility criteria.
3. Although protester literally complied with invitation for bid's level option pricing provision (LOPP) that line item unit prices for option quantities not exceed unit prices for basic quantities, lump sum price reduction for basic quantity effectively circumvented LOPP and bid may not be considered for award since manner of bidding prejudiced other bidders.

Sentinel Electronics, Inc. (Sentinel), Cincinnati Electronics Corporation (Cincinnati) and E-Systems, Inc. protest the proposed award of a contract to any bidder other than themselves under invitation for bids (IFB) DAAB07-80-B-0116, issued by the Department of the Army. The IFB solicited bids for a range of quantities of radio set AN/PRC-77, contract line items (CLINS) 0001 and 0002, and a range of quantities for receiver transmitter RT-841, CLINS 0003 and 0004. CLINS 0002 and 0004 are for the Army's Foreign Military Sales requirements. The Sentinel and E-Systems protest against award to Cincinnati is sustained; the Cincinnati protest against award to any other bidder is denied; the E-Systems protest against award to Sentinel is dismissed.

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The IFB provided that award would be based on, among other factors, the total price quoted for all items. The IFB required a bidder to enter a unit price for each item and provided spaces in the schedule so a bidder could enter a unit price for each item's three range quantities. At bid opening, the Army announced the award quantities for each item and multiplied the award quantities within each range by the item's unit price for that quantity range.

The ranking of the bidders from the low bidder to the high bidder was as follows:

Hallcrafters	-	\$10,175,056
Cincinnati	-	11,836,514
Sentinel	-	12,312,332
E-Systems	-	12,554,856
Tardisan Limited	-	14,098,524

Cincinnati's aggregate price, i.e., including option quantities was higher than Sentinel's aggregate.

The IFB also contained a level option pricing provision (LOPP). This provision allowed the Government to increase the quantity of CLINS 0001-0004 up to but not exceeding 100 percent "at unit prices no higher than the lowest unit price bid for these CLINS," and cautioned bidders "that an offer containing an option price higher than the lowest basic price for the same item may be accepted only if such acceptance does not prejudice any other offeror." The IFB further advised that bids would be evaluated on the basis of the award quantity, exclusive of option quantity. The Army proposes to reject Cincinnati's bid as non-responsive for violation of the LOPP provision to the prejudice of other bidders. We agree.

#### 1. Protest Against Award To Low Bidder

Sentinel's protest with respect to the low bidder, Hallcrafters Company, is moot because the Army determined that the firm was nonresponsive and the Small Business Administration (SBA) declined to issue the firm a Certificate of Competency (COC). E-Systems has withdrawn its protest regarding Hallcrafters. There is, therefore, no issue with respect to this portion of the protest which requires consideration by this Office.

## 2. Protest Against Award To Sentinel

E-Systems' protest against award to Sentinel is not for consideration because it is based on E-Systems' contention that Sentinel (the third low bidder) cannot meet the IFB's definitive responsibility criteria. The Army agreed but referred the matter to SBA for the possible issuance of a COC. In this connection, we have been informally advised by SBA that it informed the Army that a COC would be recommended for Sentinel. Since by law, SBA conclusively determines the matter of a firm's responsibility by issuing or refusing to issue a COC, 15 U.S.C. § 637(b)(7)(A) (Supp. I 1977); Old Hickory Services, B-192906.2, February 9, 1979, 79-1 CPD 92, we will not question SBA's issuance of a COC unless the protester shows either fraud on the part of Government officials or that SBA did not consider certain vital information bearing on the small business bidder's compliance with the definitive criteria. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. In this regard, no such fraud has been shown, and SBA has advised us that it carefully considered Sentinel's compliance with the definitive responsibility criteria. Under the circumstances, we have no basis to now question SBA's proposed action should such a COC be issued. See Baxter & Sons Elevator Co., Inc., B-197595, December 3, 1980, 60 Comp. Gen. \_\_\_, 80-2 CPD \_\_\_. We dismiss E-System's protest in this respect.

## 3. Protest Against Award To Cincinnati

Sentinel and E-Systems maintain that the second low bidder, Cincinnati, which is in line for award because SBA did not issue a COC to Hallicrafters, submitted a nonresponsive bid because the bid violated the LOPP. Inasmuch as the Army agrees with the protesters in this regard, we need only decide whether the Army properly rejected Cincinnati's bid as nonresponsive.)

In accordance with the LOPP, Cincinnati bid the same unit price for both the basic and option quantities, but attached to its bid a cover letter which provided:

" \* \* \* If the award is made in a timely manner, i.e., within the 90 day validity period of this bid or at such time that continuity of production remains unbroken, whichever is later, reductions in costs of up to \$1,029,600, depending on quantity, can be realized as a result of manufacturing continuity \* \* \*. However, because of the nature of the procurement, the

quantity to be awarded during the life of the contract cannot be ascertained. Therefore, in order not to prejudice other offerors, we have chosen to offer the total savings as a one time, non-recurring lump sum reduction in amounts based on the total quantity of AN/PRC-77 and RT-841 units of CLIN Items 0001, 0002, 0003 and 0004.

In view of the above, therefore, Cincinnati Electronics offers, as part of this bid, a total contract price reduction, as follows:

1. \$694,800 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is 11,003 or less;
2. \$859,980 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is no greater than 13,003 and no less than 11,004; and
3. \$1,029,600 in the event that the sum of the higher quantities of the ranges announced at bid opening date for CLIN's 0001, 0002, 0003 and 0004 is no less than 13,004."

The ranges alluded to above are:

<u>ITEM</u>		<u>FROM</u>	<u>TO</u>
0001	Range A	6001	6500
	B	6501	7000
	C	7001	7500
0002	A	1001	1500
	B	1501	2000
	C	2001	2500
0003	A	2001	2500
	B	2501	3000
	C	3001	3500
0004	A	1	500
	B	501	1000
	C	1001	1500

(Bidders were to insert separate unit prices for each of the ranges.)

The Army decided to award 7,460 of item 0001; 2172 of item 0002; 2456 of item 0003 and 164 of item 0004. Since the sum of the "higher" quantities of the ranges was 13,000 (range C for item 0001 (7500); range C for item 0002, (2500); range A for item 3 (2500); and range A for item 4 (500)), the Army reduced Cincinnati's total price for the basic quantity by \$859,980. As a result, Cincinnati became the second low bidder and in line for award. However, the Army rejected Cincinnati's bid as nonresponsive because it concluded that the firm's price reduction in effect violated the LOPP to the prejudice of other bidders.

Citing numerous GAO decisions, Cincinnati takes the position that a lump sum price reduction is an acceptable method of bidding which does not render a bid nonresponsive. See 42 Comp. Gen. 746 (1963); Shamrock Five Construction Company, B-191749, August 16, 1978, 78-2 CPD 123; LML Corporation, B-184046, June 25, 1975, 75-1 CPD 387. Since Cincinnati bid the same unit price for each item for both the basic and option quantities, and only reduced its total contract price for the basic quantity, the protester believes it did not contravene the LOPP and its bid therefore is responsive. For this reason, the protester maintains that the Army cannot proportionately reduce its unit prices for the base quantity to reflect the percentage reduction in its total contract price and thereby determine that Cincinnati deviated from the LOPP.

In this respect, the Army recognizes that the protester's use of a lump sum price reduction, by itself, does not render a bid nonresponsive. The offer of a lump sum "bottom line" price reduction per se is not the issue, however. Rather, the question to be resolved is whether Cincinnati's bidding method in effect violated or otherwise circumvented the LOPP to the prejudice of other bidders in this circumstance, see ABL General Systems Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318, even though option prices were not part of the evaluation for award. We think that it did.

ABL, supra, involved a bidder whose bid was low on the base quantity and whose price was higher than the next low bidder on the option quantity still remained low for the aggregate (basic plus option quantities) of all items. We held that "where a bidder is low on the base quantity, but higher than the next low bidder on the option quantity, notwithstanding the fact that the bid remains low in the aggregate, such bid is not properly for acceptance under the terms and conditions of the IFB." The reason for this rule is that the manner of bidding

conceivably could have worked to the prejudice of other bidders because other bidders could have underbid the low bidder on the basic quantity if they too had disregarded the ceiling imposed on the option price. ABL, supra, at 479.

Although we recognize Cincinnati's manner of bidding literally complied with the LOPP, the practical effect of Cincinnati's lump sum or bottom line price reduction was the same as a direct reduction of its individual unit prices for the basic quantity. Thus, insofar as the Government is concerned, Cincinnati's lump sum price reduction effectively reduced its per unit cost for the basic quantity substantially below that for the option quantity, thereby circumventing the LOPP requirement, i.e., that the Government pay the same price for the basic and option quantities. We are not suggesting that this was Cincinnati's intent, but it nonetheless was the result.

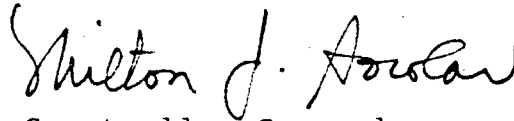
In the cases decided before ABL, supra, we held that a clear violation of an LOPP or similar provision could be waived if the offending bidder was low in the aggregate for the basic and option quantities because no other bidder could be prejudiced by acceptance of the low bid. 44 Comp. Gen. 581 (1965); B-176356, November 8, 1972. It was always our view, however, that a bid could not be accepted if, as here, the bid prices for the basic quantity plus higher option prices exceeded the sum quoted by the next low bidder. 51 Comp. Gen. 439 (1972).

Therefore, while in ABL, supra, and its predecessor cases, the offending bidders expressly violated the terms of the LOPP or similar provisions, i.e., they submitted unit prices for the option quantity higher than their unit prices for the basic quantity, we think that where the result, as here, is the same as would obtain by an actual lower unit price bid for the basic quantity, the bid should not be accepted, notwithstanding a bidder's method of bidding.

Finally, contrary to the protester's contention, its lump sum price reduction is not the same as a prompt payment discount. For purposes of bid evaluation, a prompt payment discount must be deducted from the total bid price because it is assumed that the discount will be taken. Defense Acquisition Regulation 2-407.3(b) (1976 ed.). Thus, we previously have recognized that where the option year will be evaluated, discounts would be deducted from the gross price. See Linolex Systems, Inc., and American Terminals & Communications, Inc., B-179047, June 4, 1974, 74-1 CPD 296. In this case, even though the option year was not evaluated for

purposes of award, presumably if the Government ordered the option quantities it would take any discount offered. Therefore, a prompt payment discount would not necessarily violate the LOPP. This is unlike the situation here where the protester offered the price reduction only for the basic quantity. Moreover, we could not ignore the relationship between Cincinnati's price reduction and the price for the option quantities because ABL, supra, requires an examination of the price for the option quantity to determine possible prejudice to other bidders even though the option prices are not evaluated for purposes of award.

The protests are denied in part, sustained in part and dismissed in part. ]



For the Comptroller General  
of the United States